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CURRENT TOPICS

Provision for Old Age

ONLY the elderly among us can recall the emphatic protests of employers that in no circumstances would they lick stamps for Lloyd George. In the last fifty years we have not only got used to licking stamps for Lloyd George's successors; we have become unpaid tax-gatherers for successive Chancellors of the Exchequer and before long some of us may even become collectors of maintenance for neglected wives. Whichever party wins the next general election it is clear that employers will add to their other accomplishments the collection of premiums for a graduated pension scheme. The Government's White Paper entitled "Provision for Old Age" (H.M. Stationery Office, Cmnd. 538, 1s. 3d.) explains that the proposals which it contains have three objectives. The first is to place the national insurance scheme on a sound financial basis. This is a worthy ambition but we shall be surprised if it is achieved. The second is to institute provision for employed persons who cannot be covered by an appropriate occupational scheme to obtain some measure of pension related to their earnings. The third is to preserve and encourage the best development of occupational pension schemes. During the course of his address at Eastbourne last month, Mr. PEPPIATT emphasised the need for solicitors to have pension schemes for their staffs, and there is no doubt that if we are to compete for staff with industry and the public services we shall have to do more than we are doing in this direction. If the Government's proposals are put into effect it will mean that those employed persons with earnings of less than £9 per week will pay lower contributions than at present; those with between £9 and £15 per week will, unless they are exempted, pay contributions on a graduated scale which will begin lower but end considerably higher than those existing. Those earning £15 a week or more will pay on the scale of £15 a week and no more. Each employee's contribution will be matched on the appropriate scale by an employer's contribution. For example, a female shorthand-typist earning £9 a week now has a contribution of 14s. 9d. of which 8s. falls on her and 6s. 9d. on her employer. Her proposed contribution would be 13s. 6d. of which 7s. 2d. would fall on her and 6s. 4d. on her employer. At the other end of the scale, a male clerk earning £15 a week or more now has a total contribution of 18s. 2d. whereas his proposed contribution would be 25s. 6d., of which he would pay 13s. 5d. and his employer 12s. 1d. In return for this higher contribution a man entering the graduated scheme at the age of 18 would be entitled to a pension of £6 1s. a week for himself and his wife beginning in the year 2005. The higher the age on entry the smaller the pension, so that a clerk aged 50 on entry would receive only £4 13s. a week for himself and his wife on attaining 65.

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Contracting Out

IN order to encourage, or at least not to discourage, private pension schemes it would be possible to contract out of the graduated element in the proposed scheme if it could be shown that an employee is covered by an occupational pension scheme at least as favourable as the State scheme, that such a scheme is financially sound and that pension rights are not lost either on a change of employment or on cessation of the occupational scheme. It would therefore become a matter of considerable importance for employers, including solicitors, to decide whether to contract out or not. The key to the problem appears to us to lie in the transferability of contributions and benefits. For example, a private scheme which provided for the employer's contributions to be retained by the fund and not handed over to an employee on leaving would presumably not qualify as a basis for contracting out. Many employers will thus be faced with the choice between double insurance and modifying existing schemes. In any event it will probably be advisable not to contract out so far as younger women are concerned. At first sight it might seem tempting to contract out for older women and for men, but it seems to us that, at least for those firms which do not already have a pension scheme, there is one overwhelming advantage in remaining in the State scheme. That advantage is that, whatever may have been the contributions, there will be irresistible political pressure to raise the benefits if the value of money falls. Private schemes can and do erect some hedges against inflation, but no private scheme can call on the taxpayer. We cheerfully admit the charge of cynicism, which is justified by the experience of the past fifty years. In 1979 nearly one-fifth of the population will be old-age pensioners, and if the value of the pound in the next twenty years has fallen still further only the most starry-eyed idealist can imagine that any political party would be able to resist the pressure to increase pensions.

The Paper Involved

WE are somewhat apprehensive about the complexities which will arise in administering the scheme, especially as the White Paper is understandably coy on the subject. We are grateful for the hint that it might be possible to organise the collection of contributions on the lines of P.A.Y.E., but concerned at the implications of the statement that the Government intend to enter into detailed discussion of the technical problems with representatives of those concerned as soon as possible. We suspect that some at least of the technical problems will prove to be tough. We should add that all self-employed persons will remain on the basic rate and will not participate in the graduated scheme and that cards and stamps will still be retained for them. National insurance is already complicated and we wonder whether, before we embark on more complexities, it would not be worth while making a wholly different approach. In real terms the pensions which are paid at any particular time depend on the national income at that time and upon the share of that national income which is allocated to support those who have retired. In 1979, when one-fifth of the population will be of pensionable age, the value of their pensions will depend on the amount of work which the other four-fifths are willing to do and not on the number of stamps on the cards of the one-fifth.

Advancement of "Social Welfare"

Two recent decisions involving the interpretation of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, are obviously of some importance. It will be remembered that s. 8 (1) (*a*) provides that rating relief shall be available in respect of "any hereditament occupied for the purposes of an organisation . . . which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare." In both cases, *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation* (1958), *The Times*, 17th October, and *Working Men's Club and Institute Union, Ltd.* v. *Swansea County Borough Council* (1958), *The Times*, 18th October, the ratepayers were not established for profit and the only question to be answered was whether they were "concerned with the advancement of . . . social welfare." In the *Independent Order of Oddfellows* case, in order to succeed counsel for the ratepayers were faced with the difficult task of distinguishing the decision of the House of Lords in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* [1958] 3 W.L.R. 172, and the Court of Appeal found that their attempt to do so had been unsuccessful. PEARCE, L.J., was of the opinion that the main and dominant object of the society was the mutual insurance of its members and, in his view, the words of the Act under consideration were intended to connote something more than the mere distribution of money or money's worth. Something of the spirit in the nature of "good works" was required. The MASTER OF THE ROLLS and SELLERS, L.J., agreed with his lordship's judgment but the second recent case did not produce the same degree of unanimity. The appellant ratepayers asked the Divisional Court (LORD PARKER, C.J., CASSELS and STREATFEILD, JJ.) to say that they were entitled to rating relief in respect of a convalescent home. The Lord Chief Justice admitted that it was a matter which had given him considerable doubt but he held that the appellant organisation was conducted for the advancement of "social welfare" as its declared aim was "to carry on the business of general advisers, teachers of the doctrine of association for social or ameliorative purposes."

Footing the Bill

CUSTOM plays a prominent part in the solemnization of marriages and in the festivities which normally follow the ceremony. Unfortunately it is equally true that these happy occasions are not infrequently marred by family disputes. Both of these aspects of matrimony were to the fore in a case which recently came before His Honour Judge RAWLINS in the Amersham County Court. It appeared that a wedding feast was arranged and held at the "Nag's Head" but when it was over the parents of the happy couple could not reach agreement as to which of them was to foot the bill. The bridegroom's mother contended that the bride's mother should pay for the reception as, by custom, it was her privilege and duty to do so, but His Honour did not accept this argument as such a custom had not been proved. Judgment was entered in favour of the landlord against the bridegroom's mother who had, in fact, ordered and arranged the meal. There can be no doubt that custom has not wholly lost its law-creating efficacy, but it seems that the custom whereby the bride's parents pay for the reception is not one which will be recognised and taken into account by the courts.

TAXATION OF DAMAGES

DEVELOPMENTS OF THE GOURLEY RULE

EVERY student of law carries in his mind the names of a few leading cases which have either introduced an entirely new principle of law or have completely redirected the development of the law in a particular sphere. The decision in *British Transport Commission* v. *Gourley* [1956] A.C. 185 will surely be accounted such a case, because the court in deciding that awards of damages for personal injuries should take account of taxation, reversed the rule which had hitherto been generally accepted, and initiated a series of cases in which the rule has been rapidly and widely extended. In addition, *Gourley's* case also has the distinction of being one of that select band of decisions which have been the exclusive subject of a Law Reform Committee Report. The report in this case (1958, Cmnd. 501) was remarkable for the lack of unanimity among its distinguished members. The purpose of this article is to review shortly the major developments of the rule, and to consider whether an early change in the law is likely.

It will be recalled that in *Gourley*, the plaintiff in the inferior court had been awarded £9,000 for pain and suffering, and an additional £37,720 in respect of loss of earnings over the coming years. The House of Lords held that the judge ought to have taken the tax position into account, and that the award in respect of loss of earnings should be reduced to £6,695. *Gourley's* case was an action for personal injuries, and the sum found liable to tax represented loss of earnings. Lord Goddard, in his judgment (in which Lords Radcliffe and Somervell concurred), indicated that the same rule would apply in actions for loss of earnings through wrongful dismissal, but he was not prepared at that stage to extend the rule any further.

Wrongful dismissal

The practical difficulties arising from the decision were soon to be illustrated in *Beach* v. *Reed Corrugated Cases, Ltd.* [1956] 1 W.L.R. 807, an action for damages for wrongful dismissal. In assessing damages, in which the tax liability was not disputed, it was held that regard should be had to the fact that the plaintiff was able and intended to dispose of his capital and income by gift and under covenant in such a way as to reduce his liability to income tax.

Pensions on liquidation

Later in the same month, May, 1956, the decision in *Re Houghton Main Colliery Co., Ltd.* [1956] 1 W.L.R. 129, extended the rule to pensions. In that case, lump sums were paid to the respondents in respect of pensions commuted on the liquidation of the company which employed them. It was held that the sums were compensation for the breach of contract involved in the termination of the pensions on liquidation, and were therefore liable to taxation.

Loss of profit

In June, 1956, the House of Lords in the case of *West Suffolk County Council* v. *W. Rought, Ltd.* [1957] A.C. 403, extended the rule to the assessment of compensation for loss of property resulting from a compulsory purchase order. In that case, a local authority acquired by compulsory purchase factory premises belonging to a manufacturing company who claimed appropriate compensation for their loss. Their claim included loss of profit in respect of specific orders which they had lost during the disturbance of their removal to other premises. It was held that the Lands Tribunal in assessing compensation should take into account the amount of additional taxation payable if the profits lost had actually been earned by the company. It may be noted, however, that Lord Keith entirely reserved his opinion on how far the *ratio* of *Gourley* could be applied in assessing the value of land.

Salvage awards

In *The Telemachus* [1957] P. 47, a claim for salvage service was made by the master and crew of a salving vessel. It was held by Willmer, J., that the rule in *Gourley* should apply to an award of salvage, and the incidence of taxation on any award was an element to be taken into consideration in assessing such an award. The judge accepted the argument that, in the interests of public policy, the incidence of taxation on a salvage award should not be allowed to have the effect of discouraging seamen from rendering salvage services. The result was that the awards made were *larger* than they would have been if the judge had disregarded the tax element, and for once the persons receiving the award did not suffer any net financial loss from an application of the *Gourley* rule.

This case was, however, not followed by Pilcher, J., in another salvage case, *The Makedonia* [1958] 1 Q.B. 365. It was there held that a salvor, who is already generously rewarded on well-known principles, should not have his award further increased so as to indemnify him wholly or in part for the tax he may have to pay on the award. Pilcher, J., therefore disallowed an additional award of £15,000 to the crew of the salvaging vessel by way of contribution towards the tax payable by them under Canadian law.

Some distinction may perhaps be made between these two cases in that the crew who salvaged *The Telemachus* were ordinary seamen, whereas the Canadian crew who rescued *The Makedonia* were employed by a company of professional salvors. To that extent, therefore, the argument on the ground of public policy could be ignored, in that the professional salvors needed no special encouragement to salve, as they were merely doing their ordinary job of work.

Trespass and conversion

Gourley's rule has also been applied to claims for damage for trespass and conversion. In *Hall & Co., Ltd.* v. *Pearlberg* [1956] 1 W.L.R. 244, the defendant unlawfully entered into possession of two farms and occupied them for ten months without paying any rent. The plaintiffs recovered damages under the heads of both trespass and conversion. The damages for trespass included (*a*) a sum equal to one year's rent which the plaintiffs would have received but for the defendant's trespass, and (*b*) certain other items including depreciation and damage to fences. The rent, if it had been received, would have been liable to taxation in the hands of the plaintiff, but no assessment would have been made on the items covered in (*b*). The court therefore made a tax deduction in respect of the damages payable for the loss of rent on which tax would have been paid if it had been treated as income, but held that, with regard to the other items, the tax element must be disregarded as none of the items would have been taxable in the hands of the plaintiffs.

Details of plaintiff's income

Beach v. *Reed Corrugated Cases, Ltd.*, had first indicated the difficulties which would be involved in working out the *Gourley* rule in practice, and these were emphasised again in

Phipps v. *Orthodox Unit Trusts, Ltd.* [1958] 1 Q.B. 314. Phipps claimed substantial sums in respect of arrears of remuneration and damages for wrongful dismissal. In reply the defendants sought particulars of the plaintiff's income from every source from 1948 onwards, and details of all assessments of income tax and sur-tax made upon him in those years. It was held that while particulars should be limited to what was reasonably necessary, what was being sought was directly material to the dispute, and therefore the defendants were entitled to the particulars.

Report of Law Reform Committee

The Law Reform Committee's Report on the case, which was made in August of this year, did not contain any recommendation for revising the law, because the Committee were completely at issue on the question. Some members were opposed to *Gourley's* rule because they thought that damages should represent compensation for loss of earning capacity and not loss of earnings; what the plaintiff would have been obliged to do with his money, so far as the defendant was concerned, was in their view irrelevant. Others recommended that the law should be the same as it was before the decision in *Gourley*, except that damages should be taxable in the plaintiff's hands. The remaining members, who formed the majority, felt that no change should be made in the present law, since it would be out of touch with reality to-day to ignore the tax element in assessing damages.

Some difficulties considered

The Committee raise three points in their report which they anticipated might cause difficulties, and these points were considered in an appeal recently heard before the Court of Session in Scotland. The first point was that in some cases it may be less costly to break a contract than to perform it—a situation manifestly contrary to public policy. In *Spencer* v. *MacMillan's Trustees* [1958] S.L.T. (Notes) 39, an agent acting on behalf of himself and undisclosed principals entered into a contract for the purchase of the share capital of a limited company. The sellers refused to complete the bargain and the agent sued them for breach of contract, the sum sued for being the difference between the contract price and the value of the shares at the date of the breach of contract. The sellers argued that as the agent and his principals were carrying on a trade as buyers and sellers of companies with a view to earning profits, the sum sued for represented earnings to which the *Gourley* rule should be applied. The court rejected this argument, holding that the difference between the contract and the market price at the date of the breach could not be regarded as earnings of the concern buying and selling companies. The pursuer had lost a valuable capital asset, and was seeking a monetary substitute to compensate for his loss. The Lord Justice Clerk (Thomson) said: "It is just playing with the word 'profit' to describe as earnings the sum represented by the increased capital value."

The second point was that there might be difficulties in obtaining details of the income of the plaintiff. This had already occurred in *Phipps* v. *Orthodox Unit Trusts, Ltd., supra*. The difficulties were increased in *Spencer* v. *MacMillan's Trustees* because not only were the names of the pursuers undisclosed—apart from that of their agent, but these principals were in fact quite a large syndicate who all had different tax liabilities.

Thirdly, before even attempting to assess the amount of the plaintiff's liability to tax, the court must determine whether, in accordance with the ordinary principles of income tax law, the damages would be taxable in his hands. The Revenue were not a party to *Spencer's* case, and were therefore not to be bound by the court's decision. Theoretically, therefore, the plaintiff might suffer tax twice over, or the court in assessing damages might not take tax into account at all, on the mistaken view that the damages will be subject to tax in the plaintiff's hands.

The future

The Law Reform Committee considered the possibility of devising a procedure whereby the Inland Revenue could be made a party to proceedings in which any question of tax arose in the course of assessing damages. They accepted the view of the Revenue that any conflict between the court's decision and that of the tax authorities in subsequent proceedings was unlikely, particularly since it would normally be to the advantage of the plaintiff to argue that the damages would be taxable in his hands.

In the course of the past three years the rule in *Gourley* has been rapidly extended to cover a wide field of cases. Each fresh decision makes it all the more difficult to restore the law to what it was in pre-*Gourley* days. The Law Reform Committee suggest that it might become desirable to review the practical implications of *Gourley* after a further lapse of time. It looks, therefore, as though the rule will be with us for a considerable time to come.

N. G.

OBITUARY

MR. S. BEECROFT

Mr. Stanley Beecroft, solicitor, of Leigh-on-Sea, died on 13th September, aged 66. He was admitted in 1920.

MR. T. L. CROFT

Mr. Thomas Lister Croft, solicitor, of Wakefield and Pudsey, died on 14th October. He was admitted in 1892.

MR. H. MACDONALD

Mr. Hugh Macdonald has died at his home at Fyfield, Berkshire, aged 72. He was educated at Repton and subsequently qualified as a solicitor. He published bibliographies of Dryden and Hobbes, and his other published works included "The Phœnix Nest," "A Journal from Parnassus" and "Arden of Feversham." In 1940, Oxford University conferred the honorary degree of M.A. upon him.

MR. J. R. MASON

Mr. John Richard Mason, solicitor, of Cowley Street, Westminster, died on 15th October, aged 84. He was admitted in 1900. He played county cricket for Kent for twenty years, being captain from 1898 until 1902, and toured Australia under Stoddart in 1897–98.

MR. J. G. NICHOLLS

Mr. Joseph Godfrey Nicholls, solicitor, of Hastings, died recently, aged 87.

SIR G. CLARK WILLIAMS

His Honour Sir George Clark Williams, Bt., Q.C., county court judge on Circuit No. 30 (Glamorganshire) from 1935 to 1948, died on 15th October, aged 79. He was admitted a solicitor in 1902 and practised at Llanelly until 1908, and was called by the Inner Temple in 1909. He took silk in 1934 and was created a baronet in 1955.

COMPENSATION FOR ACCIDENTS—III

CRIMINAL SANCTIONS

OTHER critics of comprehensive insurance schemes for compensation regardless of fault have suggested that motorists and other users of the highway would not be so careful if they knew that every road victim would receive compensation. It has been said that " any such scheme would have a bad psychological effect, in making people think they are free from the consequences of their own actions on the roads." If one regards the compensation scheme in isolation from the rest of the law there might be some danger in this. But it is submitted that any such scheme must be supported by an adequate system of criminal penalties for traffic offences, whether committed by motorists, cyclists or pedestrians. Except in regard to accidents caused by pedestrians or uninsured cyclists, or property damage caused by motorists without comprehensive cover, the present civil law, although ostensibly based on the negligence of the defendant, does not thereby contribute to road safety, since an insurance company pays, not the defendant personally. The existence of " knock-for-knock " agreements between insurance companies also contributes to the tendency to avoid investigating the question of fault. On a basis of reciprocity, insurers find it much cheaper to pay the claim of their own policy-holder, irrespective of fault, and it is suggested that their existing practice under these " knock-for-knock " agreements is a rudimentary system of compensation which ignores the question of fault.

In the debates in the House of Lords on the Road Traffic (Compensation for Accidents) Bill, 1932–3, speakers frequently mentioned the alleged principle of " making people take the consequences of their acts," that is, of making them pay if they are negligent on the roads. But compulsory insurance has transformed this so-called principle into an empty form of words. In most cases to-day, the operation of the " fault " principle does not in practice affect the defendant's pocket, and, therefore, it does not restrain him from negligent driving. It is no deterrent to a potentially negligent motorist to know that his insurance company will pay if he causes injury through his negligence ; though it must be admitted that any action will be against him personally and may involve him in unpleasant publicity. The only deterrent to-day, apart from the criminal law, is the system of " no-claim bonuses " allowed by insurance companies, but since the amount involved is relatively small, it is not clear how much effect the fear of increased premiums has on the mind of a potentially careless motorist.

It is therefore submitted that a comprehensive scheme for compensation ought to be supported by an increase in penalties for traffic offences. In particular, fines for offences involving danger to others, such as dangerous driving, or driving without due care and attention, should be heavily increased, and in every case (whether or not actual injury or damage was caused) the whole of the fine, or at least a substantial part of it, should go to swell the Central Insurance Fund. A compulsory payment into the Fund in the form of a fine would act as a deterrent, since a person cannot insure against the risk of a fine, but must pay it out of his own pocket. If fines for motoring offences were substantial, and obviously graded according to the defendant's means, the Fund would receive heavy contributions from those members of the community who, on a moral view, ought to contribute heavily to compensation. (Why should the owner-driver of a Rolls Royce not be forced to pay anything up to £500 to the Fund if he is guilty of dangerous driving ? Apart from imprisonment, a smaller fine is probably no deterrent to him.)

If a " fault " element is desirable in assessing contributions to be paid by motorists to the Fund, so that careful drivers pay less than reckless drivers, it could be based on the absence of any conviction for a traffic offence during, say, the previous three years. This would be fairer than the present system of " no-claim " bonuses or discounts granted by insurance companies. For a " no-claim " discount is not really based on the absence of fault, because it may sometimes be denied to a wholly blameless driver who has made a claim under his policy. It appears that in practice a claim will not affect future " no-claim " discounts if another person has been convicted of an offence in respect of the particular accident, or if there are independent witnesses available who can prove clearly that the accident was caused solely by the fault of a person other than the policy-holder. Frequently, however, criminal proceedings are not brought unless the police think they have an obvious case of guilt, and often no independent witnesses saw the accident.

Careful motorists who complain that the scheme would compel them to bear the major share of compensation to victims of negligent motorists should realise that they do this to-day : the premiums paid by motorists as a whole cover all negligent driving in England, whether the negligent driver was insured or not, since the Motor Insurers' Bureau is really supported indirectly by the premiums paid by all motorists. If the uninsured driver has been heavily fined for his failure to insure, payment of the fine will reduce his ability to satisfy the judgment for damages for negligence when the Bureau endeavours to recover something from him. It is only if the scheme for a Central Insurance Fund is accepted that it would be practicable to provide that all such fines for failure to insure (as well as other traffic offences) should go to support the Compensation Fund, and thereby relieve the financial burden on law-abiding and careful motorists.

Thus the whole emphasis of the present scheme is that the " fault " element ought to be vital in enforcing road safety through the criminal law, but that the payment of compensation to the victim should be completely independent of the proof of fault. Fault is a concept which naturally belongs to the criminal law, where punishment can be assessed according to the degree of fault. Contrast the position in the law of torts, where the amount of damages does not depend on the degree of fault, but on the extent of the injurious consequences of the fault. A man who is guilty of a minor fault in driving to-day may find that it caused a serious injury to the victim ; whereas a man guilty of gross negligence may escape with payment of a small sum if he was fortunate enough to cause but a slight injury. If " punishment " for fault is thought to be one justification for our civil law of negligence, then it cannot be denied that the extent of that " punishment " is purely fortuitous. Yet another point in favour of relegating the " fault " concept entirely to criminal law is the difference in the standard of proof in civil and criminal cases. A civil court, concerned with the question of compensation to the victim, will often require little persuasion that " the balance of probabilities " has just tilted against the defendant, whereas a criminal court, concerned with the question of

punishing an offence, will require "proof beyond a reasonable doubt."

Some earlier plans have imposed absolute liability on the motorist, irrespective of his fault, along the lines of the *Rylands* v. *Fletcher* principle, or of s. 40 (2) of the Civil Aviation Act, 1949; and the objection has been made to such schemes that the layman would ignore the aspect of compulsory insurance in respect of such absolute liability, and would feel that his being held "liable" at law necessarily involved fault or moral blame on his part. The writer's scheme would avoid this objection, since the motorist need not feel that he is "liable" at all, but simply that the Central Insurance Fund is "liable" to compensate the victim, in the same way as a policy-holder regards his insurance company as "liable" under its policy when the risk insured against eventuates. The Fund would not exist to indemnify the motorist in respect of his tortious liability, but rather as a personal road accident insurance cover to indemnify every victim of a road accident.

Other advantages in the scheme

If the general principles of the proposed scheme were accepted by a government, many details would of course remain to be decided. But a single, comprehensive scheme would have a number of incidental advantages not previously mentioned. For instance, if one central body administered the scheme, it would be possible for the period of car licences to be synchronised with the insurance period. At the moment a car licence for a year can be obtained on presenting evidence of compulsory insurance which might expire in a few days' time. If a compulsory insurance premium was payable at the same time as the annual car licence, and covered exactly the same period, we should have less difficulty in enforcing compulsory insurance. A motor-vehicle would then be both licensed and insured, or neither licensed nor insured. The absence of a current car licence on a windscreen would automatically mean that the current insurance premium had not been paid and enforcement of compulsory insurance would be easier than at the moment.

Any provision which aids the enforcement of compulsory insurance payments should be welcome to motorists as a whole, since it would rebound directly to their advantage in keeping such payments low if fines for non-payment were paid into the Fund. The formation of a single Fund would remove the objections of the Cassel Committee in 1937 (Cmd. 5528 at p. 162) that proposals for synchronising the insurance period with the licence period were "subject to serious administrative difficulties and disadvantages." This synchronisation operates elsewhere without any difficulty (e.g., New Zealand, Western Australia and Saskatchewan). The proposed scheme might also adopt another provision of the Saskatchewan statute in order to distribute the cost of the scheme more widely: since many drivers are not necessarily owners of motor-vehicles, drivers taking out driving licences could be compelled at the same time to pay a small premium to the Fund.

The Central Insurance Fund would, of course, take over all the present liability of the Motor Insurers' Bureau, so that a victim would receive compensation despite the non-payment of the current premium for the vehicle involved in the accident. Non-payment of the premium should be a matter for criminal penalties.

The heavy cost to the community in litigating contested running-down cases, or in negotiating settlements out of court, will be avoided if victims can claim compensation in all cases. The cost to be considered is not only that to the private persons involved, but the cost to the State whether through the maintenance of courts, or through the Legal Aid Fund. Furthermore, the scheme would protect road victims from the notorious practice of some insurers in procuring hasty and ill-advised settlements with victims before they obtain independent medical and legal opinions.

Even if there is no need to determine fault under the new scheme, difficulties will still arise in determining the degree of incapacity suffered by the victim, and, in some marginal cases, whether the particular accident was outside the scheme. It is suggested that it would be cheaper and more efficient for a special tribunal (composed of medical and legal members) to determine these issues, than for the ordinary courts to do so. The former Workmen's Compensation system was supplanted by the National Insurance (Industrial Injuries) Act, 1946, because the costs of both administration and litigation under the old system were excessive; even settlement out of court was not always cheap. The same arguments as were used to justify the 1946 Act could well apply to the proposed scheme. If that proportion of motor insurance premiums which is now spent by insurers in investigating and disputing the question of the fault of the motorist could go to swell a Central Insurance Fund, then a larger amount would be available as compensation to reach the pockets of road victims, even without any increase in existing premiums.

D. R. H.

"THE SOLICITORS' JOURNAL," 23rd OCTOBER, 1858

On the 23rd October, 1858, THE SOLICITORS' JOURNAL, discussing the education of solicitors, said that The Law Society must "provide, in enlarged educational requirements, the surest means of improving upon their past labours . . . Amid the general concurrence of opinion upon this subject there yet remain persons who contend that Latin and French are not necessary to make a sound lawyer and a prudent manager of affairs and therefore that a knowledge of these and other matters need not be exacted from those who seek to be admitted into the profession. No doubt there may be found either in the persons of these objectors or elsewhere examples of men who by study and force of character have supplied the deficiencies of their education. But general regulations must be framed to suit average capacities and if it be admitted that what is called a liberal education is the best preparation for the study and practice of the law, there can be no further question that the Incorporated Society is bound to apply the best tests . . . to prove whether the candidates . . . have been so educated. We know that there have been clerks who coming from a humble rank . . . have obtained from their masters, as a reward of much faithful service, the privilege of articles with a salary. It is said that such clerks would be excluded under the proposed system and that the profession cannot afford . . . to reject from its ranks able and ambitious men. But it is quite a mistake to suppose that such a trifling obstacle would not be easily overcome by the force of a determined spirit."

Mr. STEPHEN RIOU BENSON has been appointed deputy Chairman of the Court of Quarter Sessions for the County of Oxford.

Mr. CLAUDE HENRY DUVEEN, Q.C., has been appointed a county court judge on the Hertfordshire and Middlesex Circuit, in succession to the late Sir Godfrey Russell Vick.

DEEMED TO BE RESPONSIBLE

THREE times in the course of their long history provision has been made in the Rent Restrictions Acts for increases in the rents recoverable in respect of controlled dwelling-houses. The first was in 1920 when there was an increase of 15 per cent. and, in addition, a further 25 per cent. "where the landlord is responsible for the whole of the repairs." The second increase was the "repairs increase" provided by the Housing Repairs and Rents Act, 1954. The third was the Rent Act, 1957, imposing a new and usually higher "rent limit." In the case of the first two increases Parliament thought fit to enact that the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability. In the case of the third increase Parliament did not make any such provision.

The history of the matter is as follows. The provision in question was found in s. 2 (5) of the Rent Act of 1920. This provision was, however, repealed by s. 54 and Sched. V to the Act of 1954. Section 30 (1) of the Act of 1954, however, provided "for the purposes of this part of this Act and the Second Schedule thereto and of Section 2 (1) (*d*) of the Act of 1920 the landlord shall be deemed as between himself and the tenant to be wholly responsible for the repair of a dwelling-house in any case where the tenant is under no express liability to carry out any repairs." This section in its turn was repealed by Sched. VIII to the Rent Act, 1957.

Does this repeal mean that the proposition is no longer law?

The question arose in a case recently before the Clerkenwell County Court which involved a large number of tenancies. The landlords were applying to the court to determine (*inter alia*) the "appropriate factor" by which the gross value was to be multiplied, pursuant to s. 1 of and Sched. I to the Rent Act, 1957, in order to arrive at the rent limit. As so often, the tenancy agreements (*a*) provided for some of the repairs to be done by the landlords, (*b*) provided for some of the repairs to be done by the tenants, and (*c*) were silent concerning a large number of other repairs for which neither party was under any express liability.

The landlords in their originating application pleaded that they were to be deemed to be responsible for (*b*) and (*c*). This view was challenged but the learned deputy judge upheld it.

The main reasons in support of this decision lie in the disrepair provisions of Sched. I to the Rent Act, 1957. A tenant can (after a long and somewhat tortuous procedure) obtain a reduction in rent if he can obtain a certificate of disrepair. The local authority are not concerned with the contractual position between landlord and tenant (para. 4 (4)). But on application the county court judge shall cancel the certificate as respects any defect for which the tenant is responsible (*ibid.*). If therefore a defect arises for which neither party is liable under the terms of the tenancy agreement, it cannot be said to be a defect for which the tenant is "responsible," the certificate stands, and the landlord must remedy it if he wishes to recover rent up to the rent limit. In the light of this it follows that for the purpose of arriving at the rent limit the landlord must be deemed to be responsible for those repairs.

The decision in the case mentioned is not, of course, a binding authority. But it may serve a useful purpose if it reminds the practitioner that the old familiar proposition of the Rent Act, 1920, s. 2 (5), though it appears to have been repealed, may have some life in it yet.

M. S. G.

The Practitioner's Dictionary

"FURNITURE"

BEQUESTS of "furniture" are commonplace and while those most directly concerned will normally arrive at a decision amicably as to what part of the testator's property will pass to the beneficiary under such a gift, it may sometimes be necessary to consider the legal interpretation of the word. The exact meaning of the term will, of course, depend upon the context in which it is found.

There would seem to be little doubt that a bequest of "furniture" may include a motor-car. In *Re White* [1916] 1 Ch. 172 it was held that a motor-car passed under a gift of "furniture and all other articles of personal, domestic or household use." Similarly, where a testator bequeathed "all my furniture and household effects at present at Aubrey Lodge," in the absence of a contrary intention, a motor-car in the garage of Aubrey Lodge at the testator's death passed under this bequest (*Re Ashburnham* (1912), 107 L.T. 601). In the earlier case of *Re Howe* [1908] W.N. 223, the phrase "household furniture and effects" was found to include horses and carriages.

Manton v. *Tabois* (1885), 30 Ch. D. 92, is a decision of more general importance. Bacon, V.C., was asked to interpret the words "furniture, goods and chattels" which the testator had directed were not to be sold during his wife's lifetime. His lordship did not entertain any doubt that the rule *ejusdem generis* applied and that the testator's directive referred to "the things which were actually in the house and were necessary for the use and comfort of the testator's wife in the enjoyment of the life interest [in the house] which he gave her . . . it does not pass guns, nor revolvers, nor jewellery, nor scientific instruments." The gift was "confined to those things which, if the house had been put up to be let to a tenant as a furnished house, would have been passed over to that tenant in order that he might occupy the house." On the other hand, "furniture" does not include tenant's fixtures such as mantel-pieces, stoves, kitchen dressers and shelves (*per* Jessel, M.R., in *Finney* v. *Grice* (1878), 10 Ch. D. 13) or marble slabs or chimney pieces, or anything fixed to the freehold (*Allen* v. *Allen* (1729), Mos. 112).

Unless the surrounding circumstances compel the court to come to a different conclusion, a bequest of "furniture" will not include books (*Allen* v. *Allen*, *supra*, and *Bridgman* v. *Dove* (1744), 3 Atk. 201), a library (*Re Zouche* [1919] 2 Ch. 178) or wine (*Porter* v. *Tournay* (1797), 3 Ves. 311) but it will pass china (*Hele* v. *Gilbert* (1752), 2 Ves. Sen. 430), silver coins, trinkets, pictures, plate and linen if they contribute to the use or convenience of the householder or the ornament of the house (*Cremorne* v. *Antrobus* (1829), 5 Russ. 312)

provided they are permanently in the house in question (*per* Stuart, V.C., in *Wilkins* v. *Jodrell* (1863), 11 W.R. 588).

Re Willey (1929), 45 T.L.R. 327, is authority for the proposition that a bequest of "furniture" includes a wireless set in an oak cabinet and in *Re McLuckie* [1943] V.L.R. 137 the Supreme Court of Victoria held that a gift of "all my furniture and personal belongings" includes a motor-car, coir mats and cane chairs used outside the house, radio sets, refrigerators and a fireproof safe, but not cactus plants growing out of doors or a lawnmower, pair of steps, garden tools or a wheelbarrow. However, this decision should be compared with *Re Baron Wavertree* [1933] 1 Ch. 837 where a gift of "furniture and household effects which at the date of my death shall be in or about either of my residences" passed motor-cars, consumable stores, garden implements and tools and movable plants.

While as a general rule a gift of "all household furniture, linen, plate and apparel whatsoever" will not pass goods belonging to the testator in the way of trade or merchandise (*Le Farrant* v. *Spencer* (1748), 1 Ves. Sen. 97), it should be noted that in *Re Seton-Smith* [1902] 1 Ch. 717 it was decided that a similar gift passed an innkeeper's furniture used both for domestic purposes and in connection with his hotel business. A like point arose in *Re Smith* [1956] N.Z.L.R. 841, a decision of the Supreme Court of New Zealand. A testator gave and bequeathed "all my furniture (except carpets) and effects in my dwelling." It was held that the gift included a cash register which was in the testator's house, but as an illustration of the meaning which will be attributed to the word "furniture" this case is of limited use. Henry, J., was of the opinion that there was no reason to construe "effects" *ejusdem generis* with "furniture" as the codicil "contemplates two gifts, first, the furniture (except carpets) in the dwelling, and secondly, the effects in the dwelling." The cash register was an "effect," but not necessarily "furniture." In *MacPhail* v. *Phillips* [1904] 1 I.R. 155 the court applied the same reasoning in similar circumstances.

D. G. C.

"INHERENT VICE" IN MARINE INSURANCE POLICIES

USUALLY the underwriters of a marine insurance policy are not liable if the insured goods are lost through "inherent vice." This principle is to be found in the Marine Insurance Act, 1906, s. 55 (1), which states: "Subject to the provisions of the Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against." Section 55 (2) then goes on to say: "In particular . . . (*c*) Unless the policy otherwise provides, the insurer is not liable for . . . inherent vice or nature of the subject matter insured."

To similar effect is the relevant clause of the Institute Cargo Clauses (F.P.A.). This states: "Provided always that no liability shall attach to this policy for loss or damage occurring after the termination of such contract of affreightment and proximately caused by delay or inherent vice or nature of the subject matter insured."

The application of the general rule

Two cases in recent years have illustrated the general principle.

In *Gee & Garnham, Ltd.* v. *Whittall* [1955] 2 Lloyd's Rep. 562, a consignment of aluminium kettles was insured from Hamburg to the United Kingdom. On arrival some were found to be dented and others water-stained. Sellers, J., considered that the kettles were made of very thin metal, and that it was quite possible that some of the damage had been caused by uneven distribution or inadequate provision of wood wool resulting in pressure of one metal part against another during the handling of the goods. Inadequate packing constituted "inherent vice" and accordingly he gave judgment for the underwriters, who had been sued for a loss under the policy.

The learned judge found that the stains on the kettles had been caused by the use of wood wool, which was too wet because it had not been properly seasoned. This too constituted "inherent vice" for which the underwriters were not liable.

In *F. W. Berk & Co., Ltd.* v. *Style* [1956] 1 Q.B. 180, the assured claimed to recover from the underwriters the expenses of re-bagging and landing a cargo of kieselguhr packed in paper bags, which burst whilst being transferred from the ship's hold to a lighter. The underwriters denied liability on the ground that the kieselguhr was packed in paper bags, which were defective and inadequate to withstand the ordinary incidents of the insured transit in that the seams opened because of no adhesive or inadequate adhesive matter to keep them firmly closed and the contents secure during ordinary and necessary handling and carriage. Sellers, J., held that it was this "inherent vice" in the method of packing that brought about the special expenditure of re-bagging, and gave judgment for the underwriters. He observed (at p. 187): "If the underwriters were to be held liable they would be paying for the cost at the time and place of discharge of putting the goods into bags in the condition in which they ought to have been, but were not, on shipment. Such cost clearly does not fall within the terms of [the insurance policy]."

Contracting out of the protection of the Act

But s. 55 (2) (*c*), *supra*, contemplates that the parties may contract out of the statutory protection with regard to a loss due to the inherent vice of the goods. Thus in *E. D. Sassoon and Co., Ltd.* v. *Yorkshire Insurance Co.* (1923), 16 Ll. L.R. 129, Atkin, L.J. (as he then was), observed (at p. 133): "I think it is quite plain from the words of the Marine Insurance Act, s. 55 (2) (*c*), that a policy may provide in express words for the insurer being liable for losses which are excepted, the ordinary wear and tear, ordinary leakage and breakage and inherent vice from the nature of the subject-matter insured. The particular kind of loss, the amount of the loss, is one which . . . is a loss that may or may not happen and not one which certainly must happen; if it was a loss which certainly must happen within the voyage, I doubt whether it could ever be made properly the subject-matter of a policy of insurance."

The most recent case

In *Overseas Commodities, Ltd.* v. *Style* [1958] 1 Lloyd's Rep. 546, a consignment of tins of pork had been insured from France to England. The principal question was whether the assured had complied with a promissory warranty that all

the tins were marked by the manufacturers with a code for verification of the date of manufacture. McNair, J., held that it was not sufficient for the tins merely to be marked with a code designed for the purpose of enabling the date of manufacture to be ascertained. In his judgment the use of the words "for verification" pointed clearly and definitely to the conclusion that the tins must be marked in a manner which would identify the actual date of manufacture. The tins were marked with a code purporting to show that they had been manufactured between 1st and 7th March, whereas in fact the evidence before him indicated that the actual date of manufacture was 12th, 13th and 14th March. Accordingly, there had been a breach of the warranty and the assured could not recover under the policy.

His lordship said that this conclusion was sufficient to dispose of the action, but that it was probably convenient that he should deal with other matters which had been argued in the case. Among these was the interpretation of a clause in the policy which provided that the perils insured against were: ". . . all risks of whatsoever nature and/or kind. Average irrespective of percentage. Including blowing of tins. Including inherent vice and hidden defect. Condemnation by authorities to take place within three months of the date of arrival in final warehouse in the United Kingdom but not exceeding five months in all from date of manufacture."

Counsel for the assured said that this was the first case in which a policy, which specifically insured against inherent vice, had fallen to be decided. It was shown in the course of the trial that at the time in question it was the established practice in the United Kingdom, as between the importer and the first wholesaler, for the importer to agree to indemnify him in respect of any tins condemned by the local authority as unfit for human consumption within ninety days from the date of invoice. It was to protect themselves against this risk that the assured as importers had taken out the policy of insurance.

Counsel for the assured contended that they were entitled to claim for loss by inherent vice, if they established a loss from inherent vice occurring at any time, provided that the seeds of inherent vice were present in the goods on shipment. On the other hand, it was submitted on behalf of the underwriters that the assured must show condemnation by the authorities within the specified limits, and that condemnation was the only method of proving loss by those perils.

McNair, J., considered that it was not unreasonable to suppose that the underwriters would seek to limit the extension of the scope of the policy within certain bounds. Having regard to the peculiar nature of the subject-matter—namely, a pasteurised and not wholly sterilised pig product—it seemed inconceivable that they should, with their eyes open, have accepted liability for loss by inherent vice developing at any time in the future, since such a product must inevitably, if not consumed within a limited period, suffer loss from inherent vice, for, being perishable, it necessarily contained the seeds of its own ultimate destruction. If it had been necessary to solve this question, he would have accepted the argument of the assured's counsel on it. Further, he said that, strictly speaking, the only person who could condemn food as unfit for human consumption was a justice of the peace, and in the case in question no such condemnation had taken place. This, however, would be too narrow a construction to put on the words of the policy. He considered that there was a "condemnation by authorities" when the inspecting officer of the local authority certified that the goods in question were so unfit. By the express or implied consent of the owners or persons in possession of the goods, the reference to a justice of the peace under the Food and Drugs Act had been dispensed with.

E. R. H.- I.

A Conveyancer's Diary

MAINTENANCE FOR A DECEASED'S EX-SPOUSE

ONE of the objects of the Matrimonial Causes (Property and Maintenance) Act, 1958 (see the article at p. 643, *ante*), which received the royal assent on the 7th July, 1958, but which will come into operation on a day to be appointed, is "to enable the court after the death of a party to a marriage to make provision out of his estate in favour of the other party." This the Act does by, in effect, extending the provisions of the Inheritance (Family Provision) Act, 1938 (as amended), to the case of a former wife or husband (for the relevant part of the Act treats both alike) who has not re-married. I say here "in effect," for the method of achieving the declared object chosen by the draftsman of the Act has been not simply to provide that the 1938 Act shall henceforth apply, *mutatis mutandis*, to a former wife or husband who has not re-married, but to create a more or less self-contained code under which this new class of dependant will be able, in a suitable case, to obtain an order for the payment of maintenance out of the estate of a deceased person. Like the 1938 Act in its amended form, these new provisions apply whether the deceased died testate or intestate.

Ground of application

The ground upon which an application for maintenance by an ex-spouse must be based is that the deceased has not made reasonable provision for the maintenance of the applicant after the deceased's death (s. 3 (1)). This provision corresponds with s. 1 (1) of the 1938 Act ("if the court . . . is of opinion that the disposition of the deceased's estate . . . is not such as to make reasonable provision for the maintenance of [the] dependant"). That provision has in practice been thought to involve the consideration of two questions which, although separate, are in a simple case so closely interconnected that they are often decided without any conscious attempt at dichotomy: is the provision made unreasonable, i.e., too small for the applicant's needs; if so, what is a reasonable provision to make? The 1958 Act splits the first of these questions into two. Under s. 3 (2) before it can make an order the court must be satisfied (*a*) that it would have been reasonable for the deceased to make provision for the maintenance of the applicant, and (*b*) that the deceased has made no provision or has not made reasonable provision for such maintenance. Grammatically, there is an imperfect correspondence between these two requirements, but in view of the settled approach of the courts to the similar problem which arises under the 1938 Act it is hardly likely that in practice there will be any difference between the way in which applications under that Act have

been and are dealt with and the way in which applications under the new provisions will be dealt with. (The assimilation of the practice under the two statutes will be greatly assisted if, as is to be hoped, the new jurisdiction will be assigned to the courts familiar with the existing jurisdiction—viz., the Chancery Division.)

Requirements of order

Once the court is satisfied on the two matters mentioned the jurisdiction to make an order arises. The order to be made is an order "that such reasonable provision for [the maintenance of the applicant] as the court thinks fit shall be made out of the net estate of the deceased, subject to such conditions or restrictions (if any) as the court may impose." This is the formula of the 1938 Act, and the expression "net estate" bears the same meaning here as in that Act. The order must require that such provision should be made by way of periodical payments terminating not later than the death or earlier re-marriage of the applicant, subject to a proviso, similar to that to the corresponding part of the 1938 Act, that if the value of the net estate does not exceed £5,000, provision may be made wholly or in part by way of a lump sum payment.

Matters for court's consideration

On any application under the new provisions the court is directed to have regard to certain matters, which are listed. These are identical with the matters to which the court must have regard under the 1938 Act, with one addition: the additional matter is any application for (in effect) alimony or maintenance during the lifetime of the deceased. The provision in the 1938 Act directing the court to have regard to the nature of the property representing the estate and prohibiting the making of an order which would necessitate an improvident realisation is repeated. But there is nothing to correspond with s. 1 (7) of the 1938 Act, directing the court to have regard to the deceased's reasons, so far as ascertainable, for making the dispositions made or for not making provision. This omission will doubtless save the court the trouble of reading much scurrilous matter.

Time for application

Another doubtless carefully calculated dissimilarity between the two Acts is in the provisions governing the time at which applications have to be made. For applications under the 1938 Act this is six months from the date on which representation in regard to the deceased's estate is first taken out. With the substitution of "beginning with the date" for "from the date," the same time limit is set by s. 3 (1) of the 1958 Act; but in considering for this purpose when representation was first taken out, a grant limited to settled land or to trust property is to be left out of account, as is also a grant limited to real estate or to personal estate unless a grant limited to the remainder of the estate has previously been made or is made at the same time (s. 6 (2)). This seems to be a useful clarification of the rule under the 1938 Act. The power of the court to entertain an application out of time is also differently framed. Under s. 2 (1A) of the 1938 Act a late applicant must show that the time limitation would operate unfairly in consequence of certain stated matters, two very particular and the third only slightly less so ("circumstances affecting the administration or distribution of the estate"); s. 3 (1) of the 1958 Act provides that with the permission of the court an application may be entertained after the six-months period but before the administration and distribution of the estate have been completed. The power of the court to entertain a late application which was introduced into the 1938 Act when it was amended in 1952 has not proved a success (see, e.g., *Re Greaves* [1954] 1 W.L.R. 760), and the formula in the new Act is undoubtedly a great improvement on the old.

Protection for personal representatives

The provisions of the 1938 Act as to the discharge and variation of orders are made applicable to orders made under the new provisions, with some somewhat technical amendments. The only other provision of general interest in the new Act is s. 6 (1), which provides that the relevant provisions of the Act shall not render the personal representatives liable for having distributed any part of the estate after the end of the six-months period on the ground that they ought to have taken into account the possibility that the court might permit an application out of time. But this is without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under the new provisions. This is a useful reinforcement to s. 61 of the Trustee Act, 1925, in the particular case provided for.

Rules to come

It will be interesting to see the rules which will no doubt be made when this Act comes into operation to regulate the manner in which and, particularly, the court to which applications under these new provisions will have to be made. It will be remembered that Ord. 54F, which governs applications under the 1938 Act, contains a complete and very special set of rules. These rules were necessary (see *per* Lord Greene, M.R., in *Re Borthwick* [1948] Ch. 645, at p. 648). In general, they have worked well, and it is to be hoped that the exercise of this new jurisdiction will be governed by the same rules. This might lead, eventually, to a consolidation of these new provisions with the 1938 Act, an event which would not only make it possible for those of the new provisions which run parallel with the old, but which appear to be better devised to meet the needs of this difficult jurisdiction, to be adopted in the consolidating measure to cover all cases, but also for some of the difficulties which escaped, or arise out of, the revision of the 1938 Act in 1952 to be smoothed away. An example is the proviso to s. 1 (1) of the 1938 Act, which doubtless made sense when there was a general upper limit on the amount of the income which could be made available to satisfy an order for maintenance, but has lost all meaning since that limit was abolished.

'A B C'

MANSFIELD LAW CLUB, City of London College, announce the following arrangements for the Michaelmas Term, 1958. Thursday, 30th October: "Lord Mansfield and the Twentieth Century," by Mr. Clive M. Schmitthoff, LL.D., Barrister-at-Law. Thursday, 13th November: "The Free Trade Area Negotiations," by Mr. J. F. Cahan, B.A., B.Sc. (Econ.), of the Organisation for European Economic Co-operation. Thursday, 27th November: "Current Problems of International Law," by Mr. Elihu Lauterpacht. M.A., LL.B., Barrister-at-Law. Thursday, 11th December: A Moot, before the Hon. Lord Justice Willmer, O.B.E., T.D. All meetings are held at the City of London College, Moorgate, London, E.C.2, and will begin at 6 p.m. The meetings will be preceded by an informal tea for members and their guests in Room 114. Visitors are welcome at all meetings.

Landlord and Tenant Notebook

A CHANGE OF USER CASE

AN illustration of the possibility of losing statutory security of tenure during the term, which was the subject of the "Notebook" for 4th October last (*ante*, p. 719), has been afforded by the report of *Teasdale* v. *Walker* [1958] 1 W.L.R. 1076; *ante*, p. 757 (C.A.). The case is interesting as showing what steps may be available to a landlord of business premises who finds that his tenant is not occupying them for the purposes of a business carried on by him (the tenant).

The premises concerned were a lock-up shop (with cellar) at a seaside resort and they were habitually used, during the season, for what were called "mock auctions." The agreement under which the tenant had taken a one year's tenancy from 2nd March, 1955, contained a restriction on alienation. She had been in the habit of employing people to conduct the auctions on a wages and commission basis, the profits going to her; but in 1957, having moved elsewhere, she entered into an agreement with one *G*, the nature and effect of which became an issue in the case, and one on which the Court of Appeal's views differed from those of the county court judge. It may be convenient to say something about this agreement first.

Sham agreement

The parties were described as employer and manager. The "manager" paid the "employer" £750. His emoluments were the profits over and above the £750. He was to pay for the goods and to pay the outgoings, indemnifying the "employer."

I do not know whether any evidence was given whether *G* regarded himself and was regarded, for national insurance purposes, as an employed person or as a self-employed person; but at all events, the county court judge held that the agreement between him and the tenant was a genuine contract of service. The Court of Appeal considered it a sham. Such a construction may not be readily applied, but if one recalls the fate of the so-called "licence" in *Addiscombe Garden Estates, Ltd.* v. *Crabbe* [1957] 3 W.L.R. 980 (C.A.) (see 101 SOL. J. 986), one sees how strong the grounds were for suspecting the genuineness of the transaction. What was said by Jenkins, L.J., of the agreement before the court in that case might well apply to the one examined in *Teasdale* v. *Walker*: "The draftsman has studiously and successfully avoided the use of the word 'landlord' or the word 'tenant' throughout the document."

After term expired

The contractual term had come to an end on 2nd March, 1956, but, by virtue of the Landlord and Tenant Act, 1954, s. 24 (1), the tenancy had not come to an end and the arrangements made by the tenant for the conduct of the business during the 1956 season (which gave her the profits) were not called into question. But the 1957 arrangement described put a different complexion on the matter, and a perusal of the provisions of Pt. II shows that there were two possible courses for the landlord to take if he wanted to resume possession: (i) if the tenancy was a "business tenancy," s. 25 plus s. 30 (1) (*c*) authorised him to give a six months' notice to terminate stating that he would oppose an application for the grant of a new tenancy on the ground of a substantial breach by the tenant, relying on the breach of the covenant against alienation; (ii) if the tenancy was one to which Pt. II of the Landlord and Tenant Act, 1954, had ceased to apply, was one granted for term of years certain and one continued by s. 24 (1), he could, by virtue of subs. (3) of that section, terminate it by not less than three nor more than six months' notice in writing.

The notice

It is not altogether clear whether the landlord was conscious of these two possibilities, or whether he considered that the same document might serve either purpose; but what happened was that on 27th August, 1957, he served the tenant with a notice expiring 2nd March, 1958, in which he announced that he would oppose any application for the grant of a new tenancy on the ground of the alleged sub-letting in breach of covenant, too.

On 17th December of that year the tenant filed an application asking for a new tenancy for seven years at £400 a year. The county court judge, having held that the agreement with *G* was not a tenancy agreement, ordered the grant of a new tenancy, though one for two years only.

The Court of Appeal took, as mentioned, a different view of the true nature of the agreement with *G*; but then a new point arose. Someone remembered the provision of s. 24 (3) (*a*): where a tenancy to which Pt. II applies ceases to be such a tenancy, it shall not come to an end by reason only of the cesser, but if it was granted for a term of years certain and has been continued by subs. (1) of the section it may be terminated by not less than three nor more than six months' notice in writing given by the landlord.

Which meant that if instead of serving a s. 25 notice the respondent landlord had served a s. 24 (3) (*a*) notice he might have terminated the tenancy with less trouble; but as, apart from the matter of phraseology, the s. 25 notice did not comply with the s. 24 (3) (*a*) requirements in point of length (being more than six months), the opportunity had been missed.

Business occupation

But a more serious objection was then taken. Had the tenant qualified for an application at all? Going back to s. 23 (1), the initial provision of Pt. II, one finds that this part "applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes." It so happened that, when the application was filed on 17th December, *G* had returned the keys, having no further use for the shop; mock auctions were held only during the week following Easter, that following Whitsun, and the months of July, August and September; but arguments advanced for the applicant failed to satisfy the court that either on that date, or on 27th August (the date of the notice), she had occupied the premises for the purposes of a business carried on by her.

The return of the key enabled her counsel to argue that *G*'s occupation (though he had had an option for renewal) was transitory, and that that event had enabled the tenant to "resume the thread of her business of mock auctions"; but the circumstances, particularly the fact that she had moved to a place many miles away, were held to negative such inference, and the decision was that the application had been completely ill-founded.

Seasonal occupation

Some observations made by Pearce, L.J., on the question of the protection of tenants with seasonal businesses—there must be many such at seaside resorts—are of interest. Difficulties might, the learned lord justice pointed out, arise; and the question whether the tenant still occupied the premises for the purposes of a business carried on by him would be one of degree and fact. The length of the gap might be one consideration.

It was, of course, not necessary to go further into the question in the case before the court, but I would suggest that the principles applied might be similar to those adopted in the numerous Rent Act "*animus revertendi*" cases on the question of sufficient residence; though, in the case of purely business premises, the courts will not be troubled with problems of the effect of matrimonial differences.

R. B.

HERE AND THERE

LIGHT ON MATRIMONY

EVERY now and then there is a period when that state of consciousness of the insecurity of the souls of others which used to be known as holy wedlock has more shafts of light than usual directed on it from current legal proceedings. The lock has worked so loose and the sanctity of the Register Office or of the once-in-a-lifetime visit to the church has so lost its compelling radiance that it now seems actually pedantic to use the expression at all. And yet it is within living memory and even within the literary life of a still lively author that the lock was firmly enough fixed to give point to his satire on "Holy Deadlock." Of course, once you have jettisoned the supernatural element in marriage, there is no reason on earth why the matrimonial contract should not be dissoluble at the will of the parties like any other partnership contract. (It was obviously different when there was a reason in Heaven.) Indeed, to emphasise the down to earth realism of the civil concept of marriage it might be a very good idea to universalise as a permanent custom the inspired gesture of a recently wedded couple who brought along to the ceremony as bridesmaids a pair of chimpanzees in white frocks and lace head-dresses. During the proceedings they sat in chairs and ate toffee and afterwards they posed with their principals in the bridal group on the steps of the Register Office. Here, if you like (and I'm sure most of you do) is Darwinism coming into its own and into our own too. Here are our hairy cousins claiming kinship and having their claim enthusiastically allowed. It is a biological portent. This particular wedding happened to be a circus wedding, but then so many weddings are circuses; at any rate they have all the showmanship, even if they have not got the sawdust. And by accident perhaps, as with so many great discoveries, it has found the perfect symbol for modern marriage generally, which has all the precariousness of life on the branch of a tree: When the bough breaks the marriage will fall, down will come marriage, cradle and all. And what remarkable things will break a marriage.

BREAKING IT UP

ONE blinding shaft of light on at least one aspect of insecurity in marriage has lately been directed on the matrimonial scene by a London magistrate dealing with a young wife who had pleaded guilty to a charge of insulting behaviour. "Never do anything of the sort again," he told her. "It might break up your marriage." The comment, "Who'd have thought it?" springs unbidden to one's lips when one remembers that the insulting behaviour of which she had been guilty was soliciting three car drivers. Well, yes, it might possibly affect the attitude of her spouse towards her. But, by way of contrast, apparently a sure and certain way for a man to break up his marriage is to try to make his wife say she loves him. "It is the act of a tyrant and a bully," said a Divorce Commissioner recently of a man who had held his wife down in a chair and told her "You must say that you love me." Time was when a certain masterfulness in wooing, both pre-nuptially and post-nuptially, was supposed to appeal to the primitive instincts of women; Shakespeare certainly wrote a whole play about how well it worked. But the theory has a more limited applicability now. Certainly it did not avail the man who figured in another recent divorce case which ended his marriage with an attractive girl, many years his junior, whom he had married when she was eighteen. He had adopted a masterful attitude, threatening to smack her and telling her just how to run the house. Mr. Justice Wrangham is very good at verbal portraits. Here is how he described the sequel: "This husband was taking on, not a simple young girl, but a young woman of considerably greater intelligence and far more character and personality than he himself possessed. She was also selfish and hard as nails." The husband had to console himself for his miscalculation with the melancholy victory of winning a contested divorce for desertion.

PHANTOMS OF DELIGHT

WE all know that film stars are constantly making trouble in their own and other people's marriages, but their destructive power stretches further than their personal circle. All over the world wives in their thousands have to attempt the thankless task of holding their husband's affection, not only against flesh and blood rivals, over the garden fence, over the bar, seen in the Underground, but against intangible, invulnerable, unattainable phantoms of delight setting up an inward vision with which they can never hope to compare. It is a wonder these inapprehensible interveners do not figure oftener in the divorce courts. Remoteness of damage would, doubtless, be a defence for them but the damage is there all right. Just such a case was heard recently when the court was told how the husband of a young wife "of quite exceptional good looks" (a fact found by the learned Commissioner) habitually compared her unfavourably with the ladies in the films he saw, Brigitte Bardot, Jayne Mansfield and Sylvana Mangano. Her natural verbal reaction the Commissioner refused to interpret as cruelty.

RICHARD ROE.

The Lord Chancellor proposes to appoint Sir DAVID EVANS, O.B.E., D.Litt., to be the Keeper of the Public Records from 1st January next when the Public Records Act, 1958, takes effect.

Colonel GEOFFREY BRIDGEMAN GREY, solicitor, of Birmingham, has been appointed Honorary Colonel of the 5th Battalion the South Staffordshire Regiment.

RENT ACT PROBLEMS

Readers are cordially invited to submit their problems, whether on the Rent Act, 1957, or on other subjects, to the "Points in Practice" Department, "The Solicitors' Journal," Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, but the following points should be noted:

1. Questions can only be accepted from registered subscribers who are practising solicitors.

2. Questions should be brief, typewritten, *in duplicate*, and should be accompanied by the sender's name and address *on a separate sheet*.

3. If a postal reply is desired, a stamped addressed envelope should be enclosed.

1958 Act, s. 1—New Lease—Tenant Desiring Less than Three-year Term

Q. We act for the owner of a single private dwelling-house having a rateable value of £31, which therefore became decontrolled by the Rent Act, 1957. The notice of determination under the Rent Act, 1957, in Form S as prescribed was served on the tenant on 2nd August, 1957, expiring on 6th October, 1958. The tenant has agreed to enter into a new lease but wishes the lease to be for a period of less than three years. If, for example, a lease were granted by our client, the owner, to the tenant for twelve months and thereafter on a periodic tenancy subject to a quarter's notice, what would be the effect of this? At the end of this lease would a quarter's notice as prescribed by the lease be sufficient to determine it and could the landlord, our client, then get possession automatically from the county court, or would the property be still caught by the Landlord and Tenant (Temporary Provisions) Act, 1958? Again, we are in some doubt as to the position with regard to the rent. We had it in mind that before 6th October, 1958, if a lease of less than three years were negotiated this was contrary to the Rent Act, 1957, and that the tenant could recover any excess rent which he paid under such a lease over and above the permitted rent which was being paid at the time the Rent Act came into force, but perhaps we are wrong in thinking this. If, however, we are correct, what is the position now? If it is not essential to grant a three-year lease, would it be in fact possible to charge a new and high rent to the tenant but without granting him a lease at all if he were agreeable to this course?

A. In our opinion, the effect of the grant and acceptance of a tenancy for twelve months and quarterly thereafter would be to exclude the house from the operation of the Landlord and Tenant (Temporary Provisions) Act, 1958, as long as the tenancy lasted, and if the landlord gave the suggested notice the Act would apply again on its expiration. This, we consider, is what is provided for by the concluding words of s. 1 (3): "and without prejudice to the foregoing provision, this Act shall not apply to a dwelling-house . . . during any period during which . . ." The "foregoing provisions" in question show that, as it is the tenant (technically, now the "occupier") who wants a less than three years' lease or tenancy, the object could be achieved by the grant of a three years' term with a *tenant's* option to break (s. 1 (3) (*b*)). The three years' tenancy provisions of the Rent Act, 1957, have, we consider, no bearing on this point. The enactment in para. 4 of the "Transitional Provisions on Decontrol" of Sched. IV debarred the acceptor of a three years' grant from the benefit of the "standstill" or fifteen months' "period of grace"; a tenancy for less than three years would leave him "entitled to retain possession of the dwelling-house . . . as if the Rent Acts had not ceased to apply . . ." as provided for in para. 2 of that Schedule. There is, in our opinion, no restriction on the amount of rent to be made payable; but if the tenancy should be terminable by the *landlord* within the three years, the effect, on its termination, would be that the rent would then be governed by the Landlord and Tenant (Temporary Provisions) Act, s. 2 (2).

Reduction of Gross Value—Recovery of Overpaid Rent

Q. The Rent Act problem under the above heading (at p. 723, *ante*) concerns a reduction of gross value with effect from 1st April, 1956, as a result of a proposal made on 3rd January, 1957, and settled on 15th May, 1958. The resultant overpayment of rent is said to be recoverable in full so far as it is calculated from the gross value, but only for the period from six weeks before the settlement of the proposal so far as attributable to rates. Upon further consideration it appears that the full overpayment of rates would have been recoverable under s. 12 (7) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, if that section had not been repealed by the Rent Act, 1957. Immediately before the passing of the latter Act the tenant had a right of recovery conditional only on the decision of the valuation court on the proposal. Is not this a right similar to that in *Hamilton Gell* v. *White* [1922] 2 K.B. 422, which would be preserved by the Interpretation Act, 1889, s. 38, despite the repeal of the statute?

A. The proposition put forward is interesting and arguable but we incline to the view that the tenant is only entitled to a refund in respect of overpayment of rates as set out in our previous answer. Section 12 (7) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applies where a landlord has served a "relevant notice of increase," which is defined in s. 12 (1) as a notice served in conformity with s. 3 (2) of the Rent, etc., Act, 1920. The problem dealt with a notice of increase served under the provisions of the Rent Act, 1957, which could hardly be a relevant notice under the 1955 Act, and accordingly we cannot see that any question of a continuation of an already acquired right arises. We agree, however, that the position would be as suggested if a notice of increase had been served under s. 3 (2) of the 1920 Act but the proposal was not settled until after the 1957 Act had come into operation.

Service of Second Notice of Defects of Repair

Q. I act for a tenant of controlled property. A notice increasing the rent to twice the gross value of the property has been served. The prescribed notice by tenant to landlord of defects of repair was served and complied with. The notice only related to external repairs. The tenant now contends, as he may be able to establish, that the landlord was liable for internal repairs. Under the Act a notice of defects of repair may be served at any time. Is there any reason why a notice of defects in respect of the internal repairs cannot now be served?

A. We think not. There is nothing in the Act to suggest that the tenant is debarred from serving a notice of defects in respect of defects in existence when a previous notice was served. It is possible, of course, to argue that the tenant is estopped from saying that the first notice did not cover *all* the defects existing at the time of its service but we do not consider that such an argument would prevail in circumstances as those in the problem where there might have been a dispute as to liability.

Address of Property Wrongly Stated on Form S

Q. Form S under the Rent Restrictions Regulations, 1957, was served in March, 1958, addressing the tenant as being "the tenant of 55A Smith Street." The correct address is now ascertained to be 55 Smith Street. Is the notice good?

A. Though there is no power to amend a Form S notice, we consider that the landlord would be able to rely on the reasoning in the classic case of *Doe d. Cox* v. *Anon* (1802), 4 Esp. 185 (premises accurately and fully described but called " The Waterman's Arms " instead of " The Bricklayer's Arms "), provided the tenant could not show that he had been misled.

Wrong Date of Termination Given on Form S

Q. On 22nd July, 1957, a Form S was served by a landlord on a tenant of premises decontrolled under the Rent Act, 1957. The notice gave the date of termination, mistakenly, as 1st February, 1958. The tenant is in possession after 6th October, 1958. May the landlord now commence proceedings for possession under the Landlord and Tenant (Temporary Provisions) Act, 1958, relying on such notice, or is the notice invalid and must the landlord now serve a further Form S, giving at least six month's notice to terminate, and then if the tenant still remains in possession commence proceedings for possession under the 1958 Act ?

A. In our opinion the notice is invalid (cf. *Hankey* v. *Clavering* [1942] 2 K.B. 326—if a date is given in a notice to quit it must be the correct date). Accordingly we do not consider that the landlord is entitled to commence proceedings under the Landlord and Tenant (Temporary Provisions) Act, 1958, but must serve a fresh notice of at least six months on Form S.

INTERNATIONAL LAW ASSOCIATION CONFERENCE

The forty-eighth conference of the International Law Association took place in New York City during the first week of September.

One must praise the American hosts and, in particular, their planning committee, who provided an interesting programme and excellent arrangements which involved considerable expense. A large number of the members who came to the conference from countries outside the United States were housed as guests in Hayden Hall—a new residential building of the New York University—exactly opposite the New York University Law Center, where the meetings of the conference were held.

About 450 practising lawyers, judges and law professors from many lands attended the conference, and there were also present several jurists from behind the Iron Curtain. A hope may be expressed that the International Law Association may be successful in advancing private and public international law and furthering international understanding and goodwill—through the combined activities of its members from different countries throughout the world.

Among the subjects discussed at the conference were the following :

International Monetary Law.—The special subject was money of account in case of damages, and rules on this subject should be formulated. These rules should be based on the principle that the payment of damages must come as close as possible to putting the creditor in the position in which he would be had there been no accident. Ordinarily, therefore, neither the place where an accident occurs nor the country where the tort-feasor resides nor the forum, in case of litigation, should be decisive in determining the currency of obligation.

Air Law.—The law as to crimes in aircraft was considered, and emphasis was put upon the need to establish a most rapid and acceptable means of co-operation between victims of an aviation crime and local police authorities. In this connection one should mention the problem of local jurisdiction, and reference should be made to the case of *R.* v. *Martin* [1956] 2 Q.B. 272.

The second subject of air law relates to the nature of sovereignty in outer space and the legal nature of inter-planetary outer space and the United Nations were called upon to study the legal, political, economic, social and scientific problems involved in the utilisation of such space.

Reciprocal Enforcement of Foreign Judgments.—The conference approved the principle that recognition and enforcement of foreign money judgments ought not to depend upon reciprocity.

Foreign Investments.—Problems relating to public and private foreign investments were discussed, and in this connection there are matters of special interest to lawyers, involving problems that lawyers can do much to help to solve. It was resolved that a committee should consider and report on the legal problems involved in foreign investment in order to promote such investments and secure their protection.

Other subjects discussed at the conference were : uses of waters of international rivers ; the Charter of the United Nations ; co-existence ; the legal aspects of nuclear energy ; nationalisation ; international company law ; and international medical law.

The deliberations at the conference gave expression to many important concepts relating to various aspects of law in the different fields which were on the agenda. However, the fundamental concept is that of the rule of law as the means for settling all disputes among men and among States. International law develops slowly, but one feels that some progress was secured at the New York conference.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of " The Solicitors' Journal "]

Home Ownership and Registration of Title

Sir,—It would be very unfortunate for the profession and the public if, as a result of the exuberant speeches at the recent Conservative Conference and the article in question in *Crossbow*, the impression was created that some great advance towards home ownership for all could be achieved by immediate compulsory registration of title throughout the country. Your article (p. 727, *ante*) was valuable in damping down enthusiasm in this respect.

Some simple arithmetic in typical cases illustrates the point. Assume a purchase of a house for £2,000 with a 90 per cent. loan from a building society and the same solicitor acting for purchaser and building society. The total sum over and above the loan to be found by the purchaser if the title is unregistered amounts to approximately £255. If the title is registered this figure is £249 15s., i.e., a saving of only £5 5s., or less than 3 per cent. If the purchase price is £3,000 the saving would be £6 12s. 6d., again less than 3 per cent.

Registration of title has many advantages but a sense of proportion is necessary when it is considered in political context.

London, E.C.4. ANTHONY GRANT.

Layman's Ordeal : " Seised in Fee Simple "

Sir,—The following is an extract from a letter received from one of our clients when returning a contract which we had forwarded to him for signature, and which we think others of your readers may be amused to see :—

" Certain passages are of course somewhat vague to the mere layman, who feels relieved that such affairs are in capable hands. The effect on one Francis Rhodolph Fry (whome Heaven preserve !) of being ' seised in fee simple ' is a matter of conjecture, but we feel sure that as far as we are concerned to-day, this was A Good Thing. (Do forgive me !) "

Bristol, 1. DAVID LEES & BATES.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

LAND: COMPULSORY ACQUISITION: POTENTIALITIES: COMPENSATION

Maori Trustee *v.* Ministry of Works

Viscount Simonds, Lord Morton of Henryton, Lord Keith of Avonholm, Lord Somervell of Harrow, Lord Denning

2nd October, 1958

This was an appeal from a judgment of the Court of Appeal of New Zealand of 19th December, 1956, on a case stated by the Maori Land Court relating to the basis of compensation to be awarded in respect of 91 acres of Maori land, part of an area of 242 acres near the harbour at Tauranga, compulsorily acquired by the Crown under the Public Works Act, 1928, on 15th September, 1952 (the specified date). At the date of taking there was no more than a paper plan of a proposed sub-division into lots, and if the approval of the plan had been received from the appropriate Minister and the sub-division had in fact been carried out by the provision of roads, drainage and other facilities, some of the lots could have been sold immediately for residential or industrial purposes and the balance sold in lots from time to time over a period of years. On the specified date, however, there were in fact no sub-divided lots, no roads, drainage, etc.—the land had still to be developed for subsequent occupation as building land.

LORD KEITH OF AVONHOLM, giving the judgment of the Board varying the order of the New Zealand Court of Appeal, said that the Maori Land Court in assessing compensation for the land taken must value it in its state at the time of taking, and under s. 29 (1) (*b*) of the Finance Act (No. 3), 1944, of New Zealand, that value was to be assessed at "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise." The land must be valued for what it in fact was on the specified date—a tract of land capable of sub-division into building allotments and being sold subsequently in that form, but there must be excluded from the court's contemplation retention by the claimant, and an assessment of what in his hands it would yield if sub-divided. To give a claimant compensation on the basis that there were sub-divisions of the land, when, in fact, there were not, would be to give him compensation for unrealised possibilities as if they were realised possibilities. In their lordships' opinion *St. John's College Trust Board* v. *Auckland Education Board* [1945] N.Z.L.R. 507, was wrongly decided. The case of *Turner* v. *Minister of Public Instruction* (1956), 95 C.L.R. 245, raised the precise question which was raised in the present case. The court must contemplate the sale of the land as a whole unless it appeared that the necessary legal consents to a sub-divisional plan had been given, and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far sub-divided that the sub-divided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so sub-divided might be separately valued for the purpose of arriving at the total amount of compensation. If the land had to be valued as a whole, the court, in assessing the potentialities, might take into account the suitability of the land for sub-division, the prospective yield from a sub-division, the costs of effecting such a sub-division, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself. Appeal dismissed; order of Court of Appeal varied.

APPEARANCES: *E. D. Blundell* and *Patrick O'Connor* (*Wray, Smith & Co.*); *H. R. C. Wild*, Q.C., S.-G. of New Zealand, and *J. D. F. Moylan* (*Mackrell & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[3 W.L.R. 536**

Court of Appeal

LEASEHOLD PROPERTY (REPAIRS) ACT, 1938: ENFORCEMENT OF REPAIRING COVENANT: LEAVE OF COURT

Baker *v.* Sims

Lord Evershed, M.R., Sellers and Pearce, L.JJ.

3rd October, 1958

Appeal from Clerkenwell county court.

The plaintiffs were the landlords of premises let for a term of ninety-nine years, less seven days, expiring on 18th December, 1959. In 1953 the landlords served on the defendant, in whom the lease was then vested, a notice under s. 146 of the Law of Property Act, 1925, alleging breaches of the repairing covenants in the lease. The defendant served a counter-notice pursuant to the Leasehold Property (Repairs) Act, 1938, claiming the benefit of that Act. In 1954 the defendant assigned the lease to a company and it was subsequently surrendered. These proceedings were started in 1957 by the landlords against the defendant for damages for breaches of the repairing covenants of the lease. The preliminary point was taken that the action was incompetent because the leave of the court under s. 1 (3) of the Act of 1938 was a prerequisite to the jurisdiction of the court. The county court judge held that since the plaintiffs had not obtained leave the action was not maintainable and he entered a non-suit. The plaintiffs appealed.

LORD EVERSHED, M.R., said that the appeal had raised a question of exceptional difficulty on the construction of the Leasehold Property (Repairs) Act, 1938. When the matter came before the county court, the point was taken on behalf of the defendant that the action was incompetent, because in the circumstances the leave of the court to the commencement of the proceedings was a prerequisite for the jurisdiction of the court. Admittedly no leave had been asked for or obtained. Whether leave was required was the question which the court now had to determine; and it turned particularly on the language of s. 1 (3) of the Act of 1938. The county court judge came to the conclusion that the point taken by the defendant was well taken; that, in default of leave having been obtained, there was no right to sue; and he therefore dismissed the claim. It was from that decision, upon what was treated as a preliminary question of law, that the appeal came to the Court of Appeal. The argument (very briefly put) was, that, if one looked at subs. (3) upon its own terms, with one's mind unaffected and unbiassed by anything which one thought was to be discerned from the other subsections in the same section, then the result was plain enough: it was that, once a counter-notice had been served, then there was an absolute bar against proceedings of this kind without leave of the court. In his (his lordship's) judgment, however, effect could not be given to the purpose of s. 1 of the Act of 1938, unless a limitation was read into subs. (3) to make it consistent with subss. (1) and (2). That raised the question what were the words which had to be read in? He thought that the answer was that in subs. (3) the provision that "no proceedings shall be taken" by the lessor for breach of covenant or for damages for breach thereof must be read as "no proceedings contemplated in the preceding subsections shall be taken," and, accordingly, leave of the court was only required where more than five years of the term remained unexpired. In those circumstances the appeal should be allowed.

SELLERS and PEARCE, L.JJ., delivered concurring judgments. Appeal allowed.

APPEARANCES: *B. C. Sheen* (*Herbert Reeves & Co.*, for *Kellock & Cornish-Bowden*, Totnes, Devon); *F. Petre* (*Crane and Hawkins*).

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law] **[3 W.L.R. 546**

Chancery Division

COMPANY: VOLUNTARY WINDING UP: REPORT BY OFFICIAL RECEIVER

***In re* Serene Shoes, Ltd.**

Vaisey, J. 7th October, 1958

Motion.

The liquidator and the three sole contributories of a company undergoing a voluntary winding up had sought an order under s. 307 (1) of the Companies Act, 1948, for the winding up to be stayed. The registrar ordered the Official Receiver to furnish to the court a report pursuant to s. 256 (2) of the Act. The liquidator and the contributories applied for this order to be discharged or varied.

VAISEY, J., said that s. 256 (1) and (2) were perfectly apt and easy to apply in a case of a winding up by the court. The question was whether s. 307 introduced into the machinery of voluntary winding up the provisions of s. 256. Section 256 referred to "any application under this section." That meant s. 256. The present application was not "under this section" but under the powers arising from s. 307. Again, the order under s. 256 required "the Official Receiver to furnish to the court a report." What was meant by "Official Receiver"? The expression was quite out of place when dealing with a voluntary winding up. The order which was sought to be set aside read: "It is ordered that the Official Receiver do furnish to the court a report." What official receiver? The Official Receiver as such did not come into a voluntary winding up at all. There were in fact no fewer than six Official Receivers. Which of them was supposed to furnish the court with his report? The truth was that this order was bad on the face of it. Nobody knew which of the number of Official Receivers was the person indicated, and therefore obliged to comply with the direction that was contained in the order. The order was unworkable and could not be treated as in any way dealing with anything ascertainable or imposing any obligation which could possibly be enforced by the court. For that reason alone, the impossibility of finding out exactly what the order meant and what was intended by the expression "Official Receiver," the order must be set aside and declared to be a nullity and therefore one which should be disregarded. Application allowed.

APPEARANCES: *Bryan Clauson* (*Lieberman, Leigh & Co.*); *Denys Buckley* (*Solicitor, Board of Trade*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [1 W.L.R. 1087

Queen's Bench Division

EXTRADITION: OFFENCE COMMITTED ON SHIP: JURISDICTION OF MAGISTRATE

R. *v.* Governor of Brixton Prison; *ex parte* Minervini

Lord Parker, C.J., Cassels and Streatfeild, JJ.

7th October, 1958

Application for habeas corpus.

The applicant, a seaman, was accused of having murdered another seaman on board a Norwegian ship. On arrival at a British port the applicant was committed to Brixton prison by the chief metropolitan magistrate to await extradition to Norway. On an application for a writ of habeas corpus it was submitted that, as the position of the ship at the time of the alleged crime had not been proved, it was not proved that the crime was committed "in the territory" of Norway, and that the provision of art. 1 of the Extradition Treaty of June, 1873, between Norway and the United Kingdom that: "The High Contracting Powers engage to deliver up to each other, persons who, being accused . . . of a crime committed in the territory of the one party, shall be found within the territory of the other party . . ." only applied to crimes committed on land and, therefore, the offence in question was not extraditable or, alternatively, even if "territory" was to be given a wider meaning it would not include a ship within the territorial waters of a third power.

LORD PARKER, C.J., said that a preliminary point had been taken whether, on such an application, the requisitioning government was entitled to be heard. It was unnecessary to decide that point of principle because under R.S.C., Ord. 59, r. 17, the court had power in a proper case to direct that the notice of motion be served on the representative in this country of the requisitioning government so that the court could have the benefit of their views. In the present case it would have been proper and convenient to give such a direction and, though no direction was in fact given, counsel was here representing the Norwegian Government, and would be heard should the occasion arise. On the main issue, his lordship said that counsel for the applicant contended that in the ordinary way "territory" and "jurisdiction" were two separate notions. "Territory" he would define as an area of the globe consisting of land with the territorial waters adjoining it. Therefore, a vessel on the high seas could not be in any sense a territory. The difficulty in his way was that art. 2 of the Treaty referred to assaults on a ship on the high seas. As to that, counsel contended that "high seas" in its ordinary meaning meant high seas from low-water mark and therefore would include territorial waters. To read the provision in that way was just nonsense. It was absurd to think that extradition proceedings would lie if a murder was committed just inside territorial waters and would not lie if it was alleged to have been committed just outside territorial waters. This Treaty was not treating "territory" in its strict sense, but in a sense which was equivalent to jurisdiction, and it was only in that way that one could make sense of the Treaty. The second way in which counsel put the case was that, assuming he was wrong and "territory" must be given some meaning more than its ordinary meaning, yet it was impossible to say that it covered a ship at sea when it was within the territorial waters of a third power because that would be a gross breach of international comity. But, if it was right to say that "territory" in art. 1 of the Treaty was equivalent to "jurisdiction," then assuming that the ship was at the time of the alleged murder within the territory of a foreign power, it would be only a matter of competing jurisdiction and no one suggested it was wrong to legislate to provide for competing or concurrent jurisdiction. Accordingly, it mattered not whether the ship was in the middle of the North Sea, in the territorial waters of Norway, of this country, or of any other power. The Norwegian Government had jurisdiction, and that was sufficient to enable these proceedings to be brought. Accordingly, it was unnecessary for any evidence to be tendered before the chief magistrate to show the position of the vessel and he had jurisdiction to make the order which he did.

CASSELS and STREATFEILD, JJ., agreed. Application dismissed.

APPEARANCES: *Leonard Caplan*, Q.C., and *Lawrence Verney* (*Crawley & de Reya*); *Sir Frank Soskice*, Q.C., and *Quentin Edwards* (*Neil Maclean & Co.*); *R. E. Seaton* (*Director of Public Prosecutions*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [3 W.L.R. 559

Mr. J. T. KELLETT, solicitor, of Chester City Corporation Town Clerk's Department, has been appointed senior assistant solicitor to Halifax Town Council.

Mr. CYRIL GEORGE XAVIER HENRIQUES, Commissioner for the Revision of Laws, British Honduras, has been appointed Chief Justice of the Supreme Court of the Windward Islands and Leeward Islands.

The following appointments are announced by the Colonial Office: Mr. V. G. BOULOUX, Crown Counsel, Mauritius, to be Senior Crown Counsel, Mauritius; Mr. G. LALOUETTE, Senior Crown Counsel, Mauritius, to be Master and Registrar, Mauritius; Mr. M. F. PLUMER, Magistrate, Cyprus, to be District Judge, Cyprus; Mr. A. B. RENNIE, Puisne Judge, Jamaica, to be Federal Justice, the West Indies; Mr. M. J. J. L. RIVALLAND, Master and Registrar, Mauritius, to be Assistant Attorney-General, Mauritius; Mr. M. N. Q. SAGOE, Deputy Federal Administrator-General, Federation of Nigeria, to be Federal Administrator-General, Federation of Nigeria.

The subject of "The Verdict of the Court" feature in the B.B.C. Home Service on Tuesday, 28th October, at 8 p.m., is the case of Adolf Beck, who was mistakenly convicted, served a long sentence, gained his release, and then was wrongfully convicted yet again on inaccurate evidence. Lord Birkett adds a postscript.

BOOKS RECEIVED

The Companies Act being Act I of 1956. By RANJITLAL H. PANDIA, B.A., LL.B., of the Middle Temple, Barrister-at-Law. pp. xli, 640, dxxvi and (Index) xx. 1956. Bombay : N. M. Tripathi (Private), Ltd. $8.00.

A Treatise on the Law of Execution Proceedings. By R. K. SOONAVALA, B.A. (Hons.), LL.B. With a foreword by The Honourable Mr. Justice M. C. CHAGLA, B.A. (Oxon), Barrister-at-Law, Chief Justice, High Court, Bombay. pp. xliv and (with Index) 1,450. 1958. Bombay : N. M. Tripathi (Private), Ltd. $13.50.

Notes on District Registry Practice and Procedure. Eleventh Edition. By THOMAS STANWORTH HUMPHREYS. pp. v and (with Index) 106. 1958. London : The Solicitors' Law Stationery Society, Ltd. 15s. net.

Coroners' Practice. By GAVIN THURSTON, M.R.C.P. (Lond.), D.C.H., of the Inner Temple, Barrister-at-Law. H.M. Coroner, County of London (Western District). pp. (with Index) 180. 1958. London : Butterworth and Co. (Publishers), Ltd. £1 1s. net.

The Results of Probation. A Report of the Cambridge Department of Criminal Science, edited by L. RADZINOWICZ, LL.D. pp. xvi and 112. 1958. London : Macmillan and Co., Ltd. £1 1s. net.

The Law for Writers and Journalists. By GERALD ABRAHAMS, M.A. (Oxon), Barrister-at-Law. pp. (with Index) 224. 1958. London : Herbert Jenkins, Ltd. £1 1s. net.

Spies and Informers in the Witness Box. By D. N. PRITT. pp. 96. 1958. London : Bernard Harrison, Ltd. 8s. 6d. net.

Purchase Tax. By A. T. GRIEVE, M.A., LL.D. (Cantab.), Solicitor. pp. x and (with Index) 208. 1958. London : Sweet and Maxwell, Ltd. £1 5s. net.

Negligence in Delict. Fourth Edition. By the late J. C. MACINTOSH, B.A., LL.D., Advocate of the Supreme Court of South Africa, and C. NORMAN-SCOBLE, B.A. LL.B., Advocate of the Supreme Court of South Africa. pp. xliii and (with Index) 438. 1958. Sweet and Maxwell, Ltd., agents for Juta and Co., Ltd., Capetown, Wynberg and Johannesburg. £6 net.

The Complete Guide to the Rent Acts. By LIONEL A. BLUNDELL, LL.M., of Gray's Inn, Barrister-at-Law, and V. G. WELLINGS, M.A. (Oxon), of Gray's Inn, Barrister-at-Law. pp. li and (with Index) 514. 1958. London : Sweet and Maxwell, Ltd. £2 2s. net.

A Guide to Auditing. By W. T. DENT, F.C.A. pp. (with Index) 144. 1958. London : Gee & Co. (Publishers), Ltd. £1 1s. net.

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Colony of Singapore (Non-Domiciled Parties) Divorce (Amendment) Rules, 1958. (S.I. 1958 No. 1680.) 4d.

County Court Fees (Amendment) Order, 1958. (S.I. 1958 No. 1650.) 5d. See p. 746, *ante*.

Dingwall—Ullapool Trunk Road (Aultguish) Order, 1958. (S.I. 1958 No. 1652.) 5d.

London—Edinburgh—Thurso—Trunk Road (Killiecrankie Diversion) Order, 1958. (S.I. 1958 No. 1651.) 5d.

Northern Rhodesia (Non-Domiciled Parties) Divorce (Amendment) Rules, 1958. (S.I. 1958 No. 1681.) 4d.

Probation (Scotland) Amendment (No. 2) Rules, 1958. (S.I. 1958 No. 1694.) 5d.

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Sea Fisheries (Scotland) Byelaw (No. 57), 1958. (S.I. 1958 No. 1666.) 5d.

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Stopping up of Highways (County of Lancaster) (No. 28) Order, 1958. (S.I. 1958 No. 1670.) 5d.

Stopping up of Highways (County of Lancaster) (No. 29) Order, 1958. (S.I. 1958 No. 1671.) 5d.

Stopping up of Highways (County of Leicester) (No. 12) Order, 1958. (S.I. 1958 No. 1672.) 5d.

Stopping up of Highways (County of Northumberland) (No. 2) Order, 1958. (S.I. 1958 No. 1673.) 5d.

Stopping up of Highways (County Borough of Reading) (No. 1) Order, 1958. (S.I. 1958 No. 1657.) 5d.

Stopping up of Highways (City and County Borough of Sheffield) (No. 7) Order, 1958. (S.I. 1958 No. 1658.) 5d.

Stopping up of Highways (County of Suffolk, East) (No. 2) Order, 1958. (S.I. 1958 No. 1662.) 5d.

Stopping up of Highways (County of York, West Riding) (No. 18) Order, 1958. (S.I. 1958 No. 1674.) 5d.

Taunton Corporation Water (No. 2) Order, 1958. (S.I. 1958 No. 1675.) 5d.

Wages Regulation (Flax and Hemp) (Amendment) Order, 1958. (S.I. 1958 No. 1659.) 6d.

Wages Regulation (Flax and Hemp) (Holiday) Order, 1958. (S.I. 1958 No. 1660.) 7d.

Yorkshire Ouse River Board (Transfer of Powers of the Sykehouse Drainage Board) Order, 1958. (S.I. 1958 No. 1682.) 5d.

PRINCIPAL ARTICLES APPEARING IN VOL. 102

4th to 25th October, 1958

Lists of articles published earlier this year appear in the Interim Index (to 28th June) and at p. 710, *ante* (5th July to 27th September).

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